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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

SALAMONIE PACKING COMPANY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

No. 631

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
for the Eighth Circuit.

WILLIAM C. BACHELDER,
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Cases Cited.

Statutes Cited.

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To the United States Circuit Court of Appeals for the Eighth Circuit.

Salamonie Packing Company prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above entitled cause on January 6, 1948, affirming the judgment of the District Court of the United States for the Eastern District of Missouri.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in this case is unreported as yet, but will be found at page 316 of the record herein.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; Title 28, U. S. C. A., Section 347).

QUESTION PRESENTED.

The question presented is this:

Does the mere presence of some decomposition in an article of food render the article "adulterated" within the meaning of Section 342 (a) (3) of Title 21, U. S. C. A., and therefore subject to condemnation and destruction under the Federal Food, Drug and Cosmetic Act, **even though the article is proved to be fit for food?**

Or, putting the same question in different form:

Must an article of food be proved to be unfit for food before it can be adjudged to be "adulterated" within the meaning of Section 342 (a) (3) of Title 21, U. S. C. A.?

[The pertinent language of Section 342 is as follows: "A food shall be deemed to be adulterated—(a) * * * (3) If it consists in whole or in part of any filthy, putrid or decomposed substance, or if it is otherwise unfit for food * * *."]

SUMMARY STATEMENT.

This case originated in the District Court for the Eastern District of Missouri. It is a consolidation of five separate libels for seizure and condemnation of canned tomato juice. These libels were filed as follows:

1. In the Eastern District of Missouri, Eastern Division, for 2050 cases, more or less, each containing six No. 10 cans of tomato juice (Rec. p. 2).

2. In the Northern District of Ohio, Eastern Division, for 1397 cases, each containing 6 No. 10 cans of tomato juice (Rec. p. 4).

3. In the Western District of Pennsylvania for 422 cases, each containing 6 No. 10 cans of tomato juice (Rec. p. 6).

4. In the Western District of Pennsylvania for 800 cases, each containing 6 No. 10 cans of tomato juice (Rec. p. 8).

5. In the Northern District of Ohio, Western Division, for 1792 cases, each containing 6 No. 10 cans of tomato juice (Rec. p. 10).

The contested charge in each libel was substantially as follows:

> "That the aforesaid article was adulterated in interstate commerce within the meaning of 21 U. S. C. 342 (a) (3) in that it consisted wholly or in part of a decomposed substance by reason of presence therein of decomposed tomato material."

In a Bill of Particulars the government stated that the decomposed tomato material was evidenced by the presence of mold and rot fragments (Rec. pp. 13 and 14).

The petitioner, claimant below, filed answer containing the following clause:

> "Claimant denies all of the allegations contained in paragraph 3 of each of the libels * * * and states that the tomato juice involved in these libels was neither harmful nor poisonous, but good and safe for human consumption" (Rec. p. 16).

On motion of the government the court ordered stricken out that part of the answer which alleged the tomato juice was fit for human consumption (Rec. pp. 25 and 26).

The respondent presented evidence before the jury based on laboratory tests and the conclusions of respondent's expert witnesses therefrom, that the tomato juice contained a certain microscopic amount of mold and decomposed tomato material. The respondent presented no evidence that the tomato juice was unfit for consumption and did not show any of the juice to the jury.

At the conclusion of the respondent's case the petitioner moved for a directed verdict on the ground that the respondent had not presented sufficient evidence to sustain the libels for the reason that there was no evidence that the tomato juice was not fit for food (Rec. p. 163). The trial court overruled this motion, to which ruling exception was taken (Rec. p. 165). Petitioner presented uncontradicted evidence that the tomato juice was a good and wholesome product, that it was fit for food, and that petitioner's employees drank it with their lunch every day at the factory; and two of the witnesses tasted samples and pronounced them good and wholesome (Rec. pp. 168, 178, 179, 249).

At the conclusion of all of the evidence petitioner renewed its motion for directed verdict, which was again overruled and exceptions taken (Rec. pp. 277-278).

The jury returned a verdict in each of the cases in favor of the libelant and against the claimant (Rec. p. 307).

Pursuant to the verdict the trial court ordered and decreed that the juice in each case be destroyed.

During the course of his instructions the court instructed the jury as follows:

> "Therefore, if you shall find and believe from the evidence to your clear satisfaction that the tomato juice in this case is in whole or in part adulterated by the presence of filthy, putrid, or decomposed substance, in whole or in part, it doesn't make any difference what the part is, it need not render the food, so far as the law is concerned, unfit for human consumption so far as your opinion about that is concerned" (Rec. p. 301).

To which instruction the claimant made the following objection:

> "Claimant wishes to except to the court's charge to the jury on the ground, first, that the Court failed to instruct the jury that in order that the jury may find that tomato juice be adulterated, the jury must first find that it be adulterated in the sense that it consisted in whole or in part of a filthy, putrid or decomposed substance, or was otherwise unfit for food.
>
> "In that connection claimant specifically objects to the court's failure to include the last six words of the statutory definition of adulteration, to-wit: 'or was otherwise unfit for food.'
>
> "Secondly, on the ground that the court failed to instruct the jury that if the jury believe from the evidence that it is practically impossible in actual practice to free tomato juice entirely at all times from the presence of mold and decomposed fragments, and that such mold and decomposed fragments were present in the tomato juice under consideration in this

case, in such insubstantial quantities that the jury would not regard it as filthy, putrid or decomposed in the usual, natural and practical sense of these words, that then the jury must find for the claimant" (Rec. p. 303).

From the above judgment the petitioner appealed to the Eighth Circuit Court and alleged two errors as follows:

1. "An article of food must be proved unfit for food before it can be adjudicated to be adulterated within the meaning of Sec. 342 (a) (3) of Title 21 U. S. C.

2. "Evidence of fitness for food is admissible in determining whether food is adulterated within the meaning of Sec. 342 (a) (3) of Title 21, U. S. C."

The Eighth Circuit Court affirmed the lower court and interpreted Sec. 342 (a) (3) of Title 21, U. S. C., as requiring the seizure and condemnation of food if it is decomposed in any degree even though it may be fit for food.

REASONS FOR GRANTING WRIT.

I.

The Circuit Court of Appeals Has Rendered a Decision in Conflict With the Decisions of Other Circuit Courts of Appeal on the Same Matter.

The decision of the Circuit Court in this case is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of **Van Camp Sea Food Company, Inc., v. U. S.**, 82 F. (2) 365 (C. C. A. 3d, 1936), and with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of **A. O. Anderson & Co. v. U. S.**, 284 F. 542 (C. C. A. 9th, 1922).

II.

The Circuit Court of Appeals in This Case Has Decided a Federal Question in a Way Which Is in Conflict With an Applicable Decision of the United States Supreme Court.

The decision of the Court of Appeals in this case places an interpretation upon the meaning of a Federal statute which is in conflict with the decision of the United States Supreme Court in the case of **Sligh v. Kirkwood** (1915), 237 U. S. 52, in which this court construed statutory language similar to the pertinent language of Section 342 (a) (3).

III.

The Circuit Court of Appeals in This Case Has Decided an Important Question of General Law in a Way That Is Untenable.

The decision of the Court of Appeals in this case militates against every consideration of reason and common

sense, in that it construes a federal statute in such a way as would authorize the condemnation and destruction of many essential, wholesome and desirable articles of food such as cheese, sauerkraut, meat and bread.

IV.

The Circuit Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The question of whether an article of food must be proved unfit for food before it can be adjudicated to be adulterated within the meaning of Section 342 (a) (3), Title 21, U. S. C. A., has been presented to and determined by several Circuit Courts of Appeal and District Courts, but has not yet been presented to the United States Supreme Court. Because of its obvious importance to the food industry as well as to the general public, the question should be finally settled and determined by this Court.

BRIEF

In Support of Petition for Writ of Certiorari.

I.

The Circuit Court of Appeals Has Rendered a Decision in Conflict With the Decisions of Other Circuit Courts of Appeal on the Same Matter.

The words "or if it is otherwise unfit for food," appearing in Section 342 (a) (3) of Title 21, U. S. C. A., were added to the preceding language defining the term "adulterated" in the year 1938 when the Federal Food and Drugs Act of 1906 was overhauled and revised and its name changed to the Federal Food, Drug and Cosmetic Act. Prior to the addition of these words, some basis had apparently existed for the contention that the question of fitness for food was immaterial since the only requirement expressed in the statute was proof that the article of food contained "a filthy, putrid or decomposed substance." In two recorded instances, this contention reached a Circuit Court of Appeals—these instances being in he case of **A. O. Anderson & Co. v. U. S.**, supra, and in the case of **Vamp Camp Sea Food Co., Inc., v. U. S.**, supra. The contention was repudiated in both of these cases.

In the first, the **Anderson** case, the Court, recognizing that "the statute must be given a reasonable construction to carry out and effect the Legislative policy or intent" cited (l. c. 544), the following passage from the case of U. S. v. Two Hundred Cases of Catsup (D. C.), 211 Fed. 780:

> "* * * each case must be determined on its own facts, and when it appears, as in this case, that the food is **so decomposed as to be unfit for food**, it comes

within the letter and spirit of the law." (Our emphasis.)

In the **Van Camp Sea Food Co.** case, the Court was even more explicit and emphatic. In that case, as in the instant case, the Government contended that some cartons of canned sardines were adulterated in that the product consisted in part of a decomposed substance. In that case, as here, the Government's proof consisted entirely of laboratory findings of decomposition in which, as the Court said: "fitness for food was not the criteria." The sardines were not subjected to smell or taste. In reversing the judgment below, based upon the jury verdict, and ordering dismissal of the suit, the Court of Appeals referred to the Government's "failure to open up boxes of these sardines and submit them to the inspection of the jury." Said the Court:

> "The whole situation could have been solved had the cans been submitted to the jury, who could have, by the sense of smell and taste, determined whether the sardines were fit for food."

The foregoing two cases clearly hold that unfitness for food must be read into the definition of adulteration even though the statute itself makes no mention of this requirement. The only question remaining therefore is whether the addition of the statutory words "or if it is otherwise unfit for food" eliminated such requirement.

The Circuit Court of Appeals for the Tenth Circuit in the case of **U. S. v. 1851 cartons, etc.**, 146 F. (2) 760, 1945), has apparently held that the additional words eliminated the requirement. The Circuit Court of Appeals in the present case has adopted the view expressed in that case. Petitioner respectfully submits that the decisions in these two cases are in conflict with the decisions in the **Anderson** and **Van Camp** cases, supra, for the following reasons:

Examination of the various amendments effected by the 1938 statute plainly indicates that the general purpose of these amendments was to broaden the scope of the law and thereby make it more effective. With this purpose in mind Congress sought, among other things, to broaden the definition of an adulterated article of food. Under the prior language of the law, adulteration, as defined in Sec. 342 (a) (3), was confined to filth, putridity or decomposition. By adding the words "or if it is otherwise unfit for food" Congress declared that even though the article of food was not filthy, nor putrid, nor decomposed, it would nevertheless be deemed adulterated if it was unfit for food "otherwise," i. e., for any other reason besides filth, putridity or decomposition. Thus, under the new language, fruits and vegetables that were so unripe as to be unfit for food could be adjudged adulterated even though they contained no filth, putridity or decomposition.

This construction of the effect of the added words not only gives meaning to the word "otherwise," it also avoids nullification of two federal appellate decisions of which Congress must have been fully aware at the time the amendment was adopted. Had Congress intended such nullification, one would certainly expect to find some reference to this intent in the record of the committee hearings and congressional debates and proceedings that attended the passage of the law of 1938. The record is silent on any such intention.

II.

The Circuit Court of Appeals in This Case Has Decided a Federal Question in a Way Which Is in Conflict With an Applicable Decision of the United States Supreme Court.

In holding that the words "or if it is otherwise unfit for food" do not qualify the preceding words, the Court of

Appeals in the instant case, though agreeing with the decision of the Tenth Circuit Court of Appeals in **U. S. v. 1851 Cartons, etc.**, supra, apparently disagrees with an interpretation placed upon almost identical language by the United States Supreme Court in the case of **Sligh v. Kirkwood**, 237 U. S. 52. The latter case was decided in 1915 and passed upon the validity of a Florida statute which made it unlawful to sell, ship or deliver for shipment any citrus fruits which were immature "or otherwise unfit for consumption." In passing upon the validity of this statute the Supreme Court held that under the provisions of the Act the fruit must not only be immature, but be "unfit for food." The Court distinctly stated that it did not consider what its opinion would have been if the prohibition was only against immature fruit, but that since it also had to be unfit for food, it was clearly within the right of the police power of the state. In other words, this Court has held that a phrase containing the words "or otherwise unfit for" must be construed as qualifying the previous part of the sentence.

III.

The Circuit Court of Appeals in This Case Has Decided an Important Question of General Law in a Way That Is Untenable.

The decision of the Court of Appeals in this case militates against every consideration of reason and common sense, in that it construes a federal statute in such a way as would authorize the condemnation and destruction of many essential, wholesome and desirable articles of food, such as cheese, sauerkraut, meat and bread. If the decision of the Court of Appeals in this case is allowed to stand, then the federal agency which administers the Food, Drug and Cosmetic Act would have the legal right and authority to seize and have condemned and destroyed an almost infi-

nite variety of essential, wholesome and desirable foodstuffs. For it is common knowledge that many such foodstuffs contain decomposition. A few examples will suffice. Most fine cheeses, like Roquefort, Camembert and Limburger, teem with moldy and decomposed matter. Sauerkraut contains decomposed substances. Meat that is aged and tender contains decomposition. Even bread, through the action of the yeast added to the flour, is essentially a decomposed vegetable product. If the Government's theory in this case is right, any of these articles of food could be seized at the will of the federal agency on the ground that it consisted in whole or in part of a decomposed substance, regardless of the fact that it is perfectly fit for food.

It is certainly no adequate answer to say that no agency administering the Act would think of seizing such common and wholesome foods. The point is that a construction of the statute which would authorize or make such action even possible is untenable, particularly where, as here, a different construction is not only possible, but supported by the actual language of the statute, judicial interpretations and common sense.

IV.

The Circuit Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

Although this Court did, in the case of **Sligh v. Kirkwood**, supra, decide the effect of language in a Florida statute similar to that in the statute here under discussion, it has not yet directly passed upon the interpretation to be given the words in the federal Act. As has been seen, the Circuit Courts of Appeals are at present in conflict on the subject. Because of its obvious importance to the food industry, as well as to the general public, the question should be finally settled and determined by this Court.

Wherefore, Petitioner prays that this Court issue its Writ of Certiorari directed to the United States Circuit Court of Appeals for the Eighth Circuit, and that the decision of that Court in this case be reviewed by this Court.

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 631

SALAMONIE PACKING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 316–319) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered January 6, 1948 (R. 319). The petition for a writ of certiorari was filed February 27, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an article of food which is proceeded against under Section 402 (a) (3) of the Federal

Food, Drug, or Cosmetic Act on the ground that it consists in whole or in part of a filthy, putrid, or decomposed substance, must be proved to be unfit for food to warrant the entry of a decree of condemnation under Section 304 (a) of the Act.

STATUTE INVOLVED

The pertinent provisions of the Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, 21 U. S. C. 301 et seq., are as follows:

> SEC. 304 (a) [21 U. S. C. 334 (a)].—Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce, or which may not, under the provisions of section 404 or 505, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: * * *
>
> SEC. 402 [21 U. S. C. 342].—A food shall be deemed to be adulterated
>
> (a) * * * (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; * * *.

STATEMENT

Pursuant to Section 304 (a) of the Federal Food, Drug, and Cosmetic Act, the United States

filed five libels of information in various district courts for the seizure and condemnation of quantities of tomato juice which had been shipped in interstate commerce. The libels charged that the product was adulterated under Section 402 (a) (3) in that it consisted, in whole or in part, of a decomposed substance by reason of the presence therein of decomposed tomato material. (R. 2–12.) The cases were consolidated for trial in the District Court for the Eastern District of Missouri, pursuant to Section 304 (b) of the Act, 21 U. S. C. 334 (b) (see R. 30–31). Petitioner, as claimant, denied in its answer (R. 16–17) that the tomato juice was adulterated and averred that it "was neither harmful nor poisonous, but good and safe for human consumption" (R. 16). On motion of the Government, the court struck the quoted portion of the answer on the ground that it did not constitute a defense (R. 21, 25–26). At the trial before a jury, the Government proved that the tomato juice contained mold and decomposed tomato material; that both the mold count method and the rot fragment method of examination revealed the presence of rotten tomato tissue in the juice (R. 83–87, 91, 96–99, 116–121, 129–132, 133–148, 151–162). At the close of the Government's case and again at the conclusion of the evidence, petitioner moved for a directed verdict on the ground, *inter alia*, that there was no evidence that the product was unfit for food; the motions were denied (R. 163, 165, 277–278). The

jury returned a verdict for the Government (R. 307–308), and a decree of condemnation was entered by the district court (R. 308).

On appeal, the judgment of the district court was affirmed (R. 319). The circuit court of appeals held, following *United States* v. *1851 Cartons, etc.*, 146 F. 2d 760 (C. C. A. 10), that "the statute means that food which contains filthy, putrid, or decomposed matter is to be deemed adulterated, whether or not it is fit for food" (R. 318). The court accordingly concluded that the district court did not err "in ruling that the question whether the tomato juice was fit for food was not and could not be made an issue in the case" (R. 319).

ARGUMENT

1. Section 402 (a) (3) of the Act declares that a food shall be deemed to be adulterated "if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food." It is the position of the Government that where an article of food is proceeded against on the ground that it consists in whole or in part of a decomposed substance, a decree of condemnation must be entered if it is found as a fact that the food contains decomposed matter, without regard to whether it is unfit for food or injurious to health. This view is consistent with the design of the statute to secure the purity of foods and drugs. *United States* v. *Antikamnia Chemi-*

cal Co., 231 U. S. 654; *Hipolite Egg Co.* v. *United States*, 220 U. S. 45.

It appears to be the position of the petitioner, however, that the clause, "or if it is otherwise unfit for food," qualifies the preceding clause, with the result that unfitness for food, as well as filth, putridity or decomposition, must be shown before a food may be condemned as adulterated. But this construction cannot be sustained. The whole subject of this subdivision of the statute is modified by two dependent clauses, and the second "if," following the disjunctive particle "or," plainly indicates that the second clause is coordinate and independent rather than a qualification of the antecedent clause. The first clause clearly bans all products consisting in whole or in part of any filthy, putrid, or decomposed substance, and the second clause goes on to add to the ban articles which are unfit for food *for any other reason.*

There are other subdivisions of Section 402 (a) which specify as characteristics of banned foods that they be "deleterious," "injurious to health," "the product of a diseased animal," etc. These specified characteristics thus become essential prerequisites to be proved in cases brought under those subdivisions. But in the first clause of subdivision (3), the sweeping ban of foods consisting in whole or in part of any filthy, putrid, or decomposed substance reveals a congressional determination that the presence of filth, putrid-

ity, or decomposition in a food product is itself sufficient to justify the exclusion of the product from the channels of interstate commerce. That being so, it is no part of the Government's case to establish that a product, which is proceeded against under Section 402 (a) (3) on the ground that it consists in whole or in part of a filthy, putrid, or decomposed substance, is by reason thereof unfit for food or is deleterious to health. This has been the consistent interpretation of the subdivision in the lower courts. *United States* v. *1851 Cartons, etc.*, 146 F. 2d 760, 761 (C. C. A. 10); *United States* v. *935 Cases * * * Tomato Puree*, 65 F. Supp. 503 (N. D. Ohio); *United States* v. *Lazere*, 56 F. Supp. 730, 732 (N. D. Iowa); *United States* v. *184 Barrels Dried Whole Eggs*, 53 F. Supp. 652, 655–656 (E. D. Wis.).

The history of this part of the statute likewise supports our construction. Section 7, Sixth, of the predecessor Food and Drugs Act of 1906, 34 Stat. 769, 21 U. S. C. (1934 ed.) 8, declared that an article of food should be deemed to be adulterated if it consisted "in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance * * *." Under the 1906 statute, the courts uniformly held that a food containing a decomposed substance was subject to condemnation even though it was otherwise considered as fit for human consumption or not deleterious to health. *United States* v. *Two Hundred Cases, More or*

Less, of Canned Salmon, 289 Fed. 157, 158 (S. D. Tex.); *Knapp et al.* v. *Callaway,* 52 F. 2d 476, 477 (S. D. N. Y.); *United States* v. *Two Hundred Cases of Adulterated Tomato Catsup,* 211 Fed. 780, 782–783 (D. Ore.); *United States* v. *462 Boxes of Oranges,* 249 Fed. 505 (D. Colo.); *United States* v. *133 Cases of Tomato Paste,* 22 F. Supp. 515, 516 (E. D. Pa.). The first clause of Section 402 (a) (3) of the present act follows closely the corresponding provision of the earlier statute, and it is obvious that Congress intended that the provision should have the same meaning in the new law.[1] The plain inference to be drawn from this history is that the second clause of Section 402 (a) (3) was added to reach foods which are unfit for human consumption for reasons other than that they contain filthy, putrid or decomposed substances. This, we submit, is the meaning of the word "otherwise" in the second clause, upon which petitioner's contention rests. And this construction of subdivision (3) comports with and furthers the express congressional intention to preserve in the present law the best features of the 1906 Act and at the same time to "strengthen and extend that law's protection of the consumer." S. Rep. No. 152, 75th Cong.,

[1] See S. Rep. No. 361, 74th Cong., 1st sess., p. 7:

"The provisions of section 301 (a) (3) and (5) [which subsequently were incorporated into Section 402 (a)] dealing with filthy food and food from diseased animals, are essentially the same as those of the present law."

1st sess., p. 1; see also H. Rep. No. 2139, 75th Cong., 3d sess., p. 1; *United States* v. *Dotterweich*, 320 U. S. 277, 280, 282. As the Tenth Circuit said in *United States* v. *1851 Cartons, etc.*, 146 F. 2d at 761, in rejecting the construction urged by petitioner here:

> Notwithstanding this strict construction of the language employed [2] of which Congress was undoubtedly aware, the amendment of 1938, Sec. 402, not only impliedly approved this construction of its language but strengthened it by adding words which leave no doubt of its intention to free interstate commerce of any food if it consists "in whole or in part of any filthy, putrid, or decomposed substance." The added clause "or if it is otherwise unfit for food" is in the disjunctive and does not condition, qualify, or obscure the plain meaning of the whole sentence when considered in its context. * * * This view is supported by the general purpose of the amendment to extend the range of control over impure and adulterated food and drugs moving in interstate commerce. *United States* v. *Dotterweich*, 320 U. S. 277, * * *.

Petitioner argues, however, that the decision below "militates against every consideration of reason and common sense, in that it construes a federal statute in such a way as would authorize the condemnation and destruction of many essen-

[2] The reference is to the decisions under the 1906 Act (see pp. 6–7, *supra*).

tial, wholesome and desirable articles of food," citing cheese as an example (Pet. 12–13). But it seems clear that the statutory language must be construed reasonably in the light of its obvious purposes; and that Congress intended that the words "filthy," "putrid," and "decomposed," as used in the Act, must be given their usual and ordinary meaning and not their technical, scientific, or medical definitions. There was clearly no purpose to ban foods which, though in a technical sense may be said to be decomposed in part, are commonly accepted as wholesome. See *United States* v. *Swift & Co., et al.*, 53 F. Supp. 1018, 1020 (M. D. Ga.); *United States* v. *Commercial Creamery Co.*, 43 F. Supp. 714, 715–716 (E. D. Wash.); *A. O. Andersen & Co.* v. *United States*, 284 Fed. 542 (C. C. A. 9), cited *infra*.

2. There is no conflict in the applicable decisions. Petitioner relies (Pet. 9–10) on *A. O. Andersen & Co.* v. *United States*, 284 Fed. 542 (C. C .A. 9), decided under the Food and Drugs Act of 1906. But the opinion is in no wise inconsistent with the opinion of the circuit court of appeals in the instant case. In answer to the specific contention that food proceeded against because of decomposition must be proved to be injurious to health, the court in the *Andersen* case declared (p. 544):

> That case [*United States* v. *Two Hundred Cases of Adulterated Tomato Catsup*, 211 Fed. 780 (D. Ore.)] answers the

> further contention on the part of the defendant in error that adulterated salmon is not injurious to health or dangerous to life:
>
> "It was also urged that, since there is no proof that the product in question would be injurious to health, a verdict should be ordered in favor of the claimant; but I do not understand that such proof is necessary or required under the provisions of the Food and Drugs Act, on which this proceeding is based."

Thus, the *Andersen* case is consistent with the uniform decisions under the 1906 Act. Furthermore, the court in that case rejected a contention, similar to that advanced by petitioner (Pet. 12), that the Government's construction would cause the destruction of many "desirable" articles of food, stating (p. 544):

> The defendant in error seeks to uphold the judgment on other grounds. First, it is urged that decomposition sets in immediately after the death of animals or fish; that a literal construction of the act would exclude from interstate commerce all canned fish and meat products; that for this reason the court must hold that Congress intended to prohibit the introduction into interstate commerce of products containing an unreasonable amount or quantity of decomposed matter only; and that the statute as thus construed is void for uncertainty, * * *. This argument is more specious than sound.

> Decomposition may begin where life ends, but meat or fish is not decomposed at that early stage. Decomposed means more than the beginning of decomposition; it means a state of decomposition, and the statute must be given a reasonable construction to carry out and effect the legislative policy or intent.

Van Camp Sea Food Co., Inc. v. *United States,* 82 F. 2d 365 (C. C. A. 3), also cited by petitioner as being in conflict with the decision below (Pet. 10), is not in point. The holding of the case, which also arose under the 1906 Act, was merely that the court below had erred in charging the jury that the burden was on the Government to prove its case by "the fair preponderance of the evidence" and "the fair weight of the evidence." The circuit court of appeals declared that the Government's burden was to establish its case by "clear and satisfactory evidence." The rest of the opinion appears to be dictum, but a careful reading clearly reveals that all the court adverted to, in addition to the nature of the burden of proof, was with respect to the fact that the Government had not proved that the product proceeded against was in fact decomposed as charged. But that fact was established in the present case by the verdict of the jury.

The decision of this Court in *Sligh* v. *Kirkwood,* 237 U. S. 52, upon which petitioner relies (Pet. 11–12), involved the validity, under the

commerce clause, of a Florida statute prohibiting the sale or shipment of citrus fruits which were immature or otherwise unfit for consumption. The defendant was convicted of having shipped from Florida to Alabama oranges which were immature and unfit for consumption. Upon petition for a writ of habeas corpus, the court refused to order the release of the defendant, and the judgment was affirmed upon writ of error to the Supreme Court of Florida (65 Fla. 123).

The Supreme Court of Florida held that the statute dealt with "the field of deleterious immaturity of fruit" and prohibited "immature citrus fruits produced within her [Florida] borders from becoming the subjects of shipment or sale," and was not in conflict with the Food and Drugs Act of 1906. This Court, in affirming the judgment of the Supreme Court of Florida, stated (p. 57):

> The single question is: Was it within the authority of the State of Florida to make it a criminal offense to deliver for shipment in interstate commerce citrus fruits,—oranges in this case,—then and there immature and unfit for consumption?

This Court did not interpret, or have before it the problem of the interpretation of, the Florida statute. The Supreme Court of Florida had already interpreted the law and the only question before this Court was whether the statute, as

interpreted by the Supreme Court of Florida, was in violation of the Federal Constitution. This Court refused to consider whether the statute might be constitutional if applied to shipments of citrus fruits for commercial purposes such as for making wine and citric acid, since (p. 62) "the constitutional objection must be considered in view of the case made before the court, which was a delivery for shipment of oranges so immature as to be unfit for consumption." This Court pointed out (p. 62) that "Whether such a case, as supposed, of shipment for commercial purposes, would be within the statute, would be primarily for the state court to determine, and it is not for us to say, as no such case is here presented." It seems apparent, therefore, that this Court did not interpret the Florida statute, but simply stated the construction of the Florida law by the Supreme Court of the State and held that, as so construed, the statute did not violate the Federal Constitution.

In any event, as we have shown, it is clear from both the language and history of Section 402 (a) (3) of the Federal Food, Drug, and Cosmetic Act that Congress intended to prevent the use of the channels of interstate commerce for the transportation of food which is filthy, putrid, or decomposed, without regard to whether it is unfit for food or harmful to health.

CONCLUSION

The decision below is correct, and no conflict of decisions is involved. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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